In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northern Division

PAUL H. HITCH et al., Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, Defendant.

Civil Action
No. 2744.

COURT'S OPINION IN PLAINTIFFS' MOTION FOR NEW TRIAL.

September 3, 1958.

This cause came on to be heard on motions for new trials on behalf of certain plaintiffs before the Honorable Robert L. Taylor, District Judge, on Wednesday, September 3, 1958, counsel for the respective parties being present, when at the conclusion of all oral argument presented by counsel the Court delivered the following opinion:

The Court: This case is before the Court on motions for a new trial made by numerous plaintiffs. At the beginning of the trial on April 7th, 1958, there were 74 separate alleged causes of action set forth in the complaint. Counsel in their brief stated that in 43 of these separate causes of actions verdicts were awarded in favor of the plaintiffs; voluntary non-suits were taken in nine of the cases with prejudice; three voluntary non-suits (the Court understood that there were only two) were taken without prejudice, and 19 verdicts were rendered in favor of the defendant.

In the case of Moses W. Howard and Wife vs. The Aluminum Company of America, Civil Action No. 1949, which was consolidated for purposes of trial with the case of

Paul Hitch et al. vs. The Aluminum Company of America, Civil Action No. 2744, a non-suit was taken with prejudice.

In the Howard case the plaintiff did not put on any proof but relied upon the record as a whole and the Court was required to direct a verdict in favor of the defendant. Motion for a new trial has not been made in the Howard case.

The 19 plaintiffs who failed to obtain verdicts at the hands of the jury have filed motions for new trials. Motions for new trials were filed by other plaintiffs but counsel state in their brief that 33 of the motions, in cases in which judgments were rendered for the plaintiff, have been withdrawn.

As the case now stands, according to the Clerk's records and statements of counsel in one of the briefs, there remain for consideration of the Court the motions for new trials in 29 of the actions, in ten of which judgments were rendered for plaintiffs and in 19 of which judgments were rendered for defendant.

The first motion for a new trial was filed on May 26th, 1958 by H. G. Helms and 13 other plaintiffs. This motion was filed within ten days after judgment was entered on the verdict, hence was filed within the time required by the applicable rule, which is Rule 59 (b).

There were three grounds set forth in that motion; namely, the verdict was inadequate, the verdict was so inadequate that it indicated passion and prejudice and caprice on the part of the jury, and finally the jury failed to apply the law as given by the Court in its charge.

The other plaintiffs filed their motions for new trials on June 4th, June 9th, June 23rd, June 30th, July 10th, July 11th, July 14th, July 17th and July 24th, 1958. All these motions were filed within the ten days' time except the amended motion which was filed July 24th, 1958 in

which 16 separate grounds were urged in support of the motion.

The motion that was filed on July 24th, 1958, which as indicated included additional grounds, was filed within ten days of the date of entry of judgment in the cases of R. B. Wheeler et ux, Ben Clark et al. and K. L. Cruze et al.

The defendant says that the grounds urged in the motion filed on July 24th, 1958 cannot be consjdered in any of the cases except the ones last named, which are the Wheeler, Clark and Cruze cases, because such grounds were asserted more than ten days after judgment was entered on the verdict of the jury and that the plaintiffs and their counsel had knowledge of all the additional grounds asserted in the motion on July 24, 1958 with the possible exception of grounds 14 and 15.

This presents the first legal question for the determination of the Court. In the light of the views held by the Court on the various motions which will be later stated, it is not necessary for the Court to pass on this question.

Rule 59 (b) of the Federal Rules of Civil Procedure provides that a motion for a new trial shall be served not later than ten days after entry of the judgment. Rule 6 (b) states that the Court may not extend the time for filing a motion for a new trial.

The time limitation in the rule is to prevent a motion from being used in a dilatory manner in order to extend the time for appeal as indicated by Professor Moore in his work on federal practice, Vol. 6, Ch. 59.09, "Proper Time and Manner of Filing Motions for New Trial," page 3842. if the motion is not filed in time the Court has no choice other than to deny it. After it is denied the time for appeal begins to run. A timely motion tolls the time within which an appeal may be taken. Since the time for appeal is tolled by the timely filing of the motion, reason would require the allowance of an amendment to the motion even

though the amendment is filed after the ten-day period. The weight of authority, however, is to the effect that the Court may not consider an amendment that adds an additional ground if such amendment is made after the ten-day period provided the parties knew of the grounds contained in the amended motion or should have known of such grounds by the exercise of ordinary diligence. If the added grounds though, made after the ten-day period, were not known by the parties or could not have been known, such grounds are in the nature of newly discovered evidence and the Court may consider them under Rule 60 (b). See Moore's Federal Practice, Volume 6, "Amendments to Motion," Chapter 59.09, page 3850; also, Rule 60 (b), Federal Rules of Civil Procedure.

Plaintiffs contend that since this suit involves multiple claims that Rule 59 (b) does not apply; that the controlling rule of the case is Rule 54 (b), which provides in substance that in case of multiple claims the motion for a new trial may be delayed until the last claim is determined by the Court unless the Court by specific order states that there is no reason for delay for the direction of the entry of a judgment on a particular claim. That rule applies to multiple claims and not multiple parties.

If the judgment is on a distinct and separate claim in a case involving multiple parties, the majority of the courts hold that the time for the motion for a new trial starts when the judgment is entered, and if the motion is not filed within ten days from the date of the entry of the judgment the court is without authority to consider the motion. If the liability is joint, a judgment against one is not final until all of the claims are adjudicated. See Moore's Federal Practice, Volume 6, "Multiple Litigation" and "Single Judicial Unit Theory," Chapter 54.19, pages 157-160.

In order that the upper court in the event of an appeal may have the views of this Court on the grounds set forth

in the amended motion after the limitation period, except Grounds 14 and 15, which were timely filed, the Court will consider them at this time although the majority rule is to the effect that they cannot be made the basis of a new trial because they were filed too late.

Ground No. 1 of the amended motion asserts that the Court erred in failing to charge as requested in Special Request No. 5 of plaintiff. This requested charge was, in substance, that if any of the plaintiffs sustained a permanent injury to their cattle the jury should award damages for such permanent injury in addition to the damages for the interference with the use and enjoyment of the property.

The Court is of the opinion that the question of damages was fully explained to the jury and that this ground is lacking in merit.

Ground No. 2 of the amended motion asserts that the Court erred in failing to tell the jury the loss of reputation of plaintiff's animals as brood stock was an element of damages. The Court in ruling on the questions of evidence stated in substance to the jury that they could consider the loss of reputation for high-bred stock among the plaintiffs as an element of damages. As the Court recalls two or more witnesses, expert in character, testified to the jury on this subject which testimony was allowed to go to the jury. Moreover, the substance of this request was covered in the general charge.

Ground No. 3 of the amended motion—and the grounds now under consideration all refer to the amended motion unless otherwise stated—asserts that the Court erred in failing to charge the jury that it was not necessary for any of the plaintiffs to cease their activities as farmers by selling their cattle and moving to farms outside of Blount County.

What the Court told the jury in the general charge certainly brought home to the jury that it was not necessary for the farmers to sell their cattle and to move from their farms in order for them to recover damages which they had sustained in the case.

The Court on numerous occasions in ruling on points of evidence as well as on parts of its charge stated to the jury that in determining damages sustained by the plaintiffs they should consider any interference with their use and enjoyment of their farms that was connected with the nuisance as an element of damage.

Grounds Nos. 4 and 5 also complain of the Court's action in refusing to charge special requests. The Court is of the opinion that these grounds are also lacking in merit.

Grounds Nos. 6 and 7 complain of the action of the Court in refusing to discharge the juror Hartman because of the matters set forth in those grounds.

The Court during the trial heard proof on the matters referred to in these two grounds in chambers in the presence of counsel for all the parties and was convinced then that the grounds charged were not sufficient to justify the Court in excusing or discharging Mr. Hartman from the jury. This Court is still of that opinion.

Ground No. 8 asserts that the Court erred in failing to declare a mistrial because Juror Duncan talked to two of the plaintiffs during a weekend recess.

The record will show that the Court offered to excuse Juror Duncan if either side requested. Both sides agreed for Juror Duncan to continue to serve as a juror. The Court also heard proof on this question and was of the opinion then and is still of the opinion that that which Juror Duncan was alleged to have said to two of the plaintiffs was not a sufficient justification for the Court to declare a mistrial.

Ground No. 9 complains of the Court's failure to allow plaintiffs to take a voluntary non-suit. What has been stated in respect to Ground No. 8 applies to this ground.

Grounds Nos. 10, 11, 12 and 13 complain of the action of the Court in not discharging Juror Sandlin or declaring a mistrial or permitting plaintiffs to take a voluntary non-suit because of the alleged misconduct of Juror Sandlin that took place during the trial.

One of the grounds of misconduct is what the Juror Sandlin spoke to Richard Carson, Esquire, one of the attorneys for the plaintiffs, to the effect that "Dick, let's get along with the trial."

Of course, the Court does not condone statements of that kind or actions of that kind by a juror. The statements were made under stress of circumstances, and the Court was of the opinion after hearing counsel for both sides in chambers concerning the matter and is still of the opinion that the Court acted properly in refusing to discharge Mr. Sandlin from jury service.

Reference is also made in one of the grounds relating to Juror Sandlin that the Court should have excused him when he said he was physically unfit to serve.

In the opinion of the Court a reading of what was said by the juror Sandlin in chambers in the presence of counsel for all parties will show that Mr. Sandlin did not say that he was physically unfit to continue service as a juror. The Court offered to excuse him if he felt that he was not physically able to serve.

Juror Sandlin was accepted by plaintiffs and by the defendant, and although plaintiffs apparently felt that he was not treating them in a fair manner, such feeling did not justify the Court in peremptorily discharging him from jury service. It is a serious and grave matter for the Court during a trial to discharge a juror in service. In order to justify such action there must be a sound basis.

Ground No. 16 asserts that the Court erred in requiring the jury to hear and determine five claims or actions at a time.

The record will show that during the pre-trial conference this procedure was discussed, and so far as the Court knew it was satisfactory to all parties. The Court in trying the cases together and in trying five claims at the same time, acted in part at the instance of the plaintiffs because the plaintiffs had asserted through their counsel in the discussions of some of the motions that if the cases were not consolidated and tried at the same time that the expense of the trial would be a tremendous burden on the plaintiffs. In other cases, particularly condemnation cases by the Government, as many as six and eight parcels of land for the taking of which damages were claimed have been considered by the jury at the same time.

The Court knew of no reason then and knows of none at the present time why the jury could not consider five claims at a time and do justice to all parties. True, at the request of the jury and with the consent of all parties, the pre-trial order was amended so as to permit the jury to consider the claims singly.

In the opinion of the Court this ground is without merit.

The Court is of the opinion that the grounds urged in support of the amended motion are lacking in merit except Grounds 14 and 15. These grounds will now be considered.

Grounds Nos. 14 and 15 present more troublesome questions.

Ground No. 14 asserts that Juror P. E. Hartman was guilty of misconduct in that during the trial he viewed or inspected cattle that were located in the Blount County area that was involved in the suits.

In support of this ground affidavits have been filed by Juror Moneymaker, who testified during this hearing in

the motions, and Juror Thomas. Mr. Moneymaker heard Juror Hartman state that he had visited what will be referred to as the critical area on more than one occasion and that he had observed the cattle on those visits and they looked to be fine cattle. Mr. Moneymaker is of the opinion that those statements were not made by Juror Hartman until the last week of the trial.

The affidavit of Mrs. Thomas, a juror, states in substance that Juror Hartman on various occasions stated that he had travelled about Blount County while the trial was in progress and had observed numerous herds of cattle on numerous farms and he had never seen finer looking cattle.

The affidavit also states that Hartman told the jury "that the Aluminum Company employed a large number of people, stating the number, and remarked that this fed many hungry mouths. This statement was made in a loud voice, drowning out the voice of the witness then being interrogated. In consequence of the matters here stated affiant was forced to request the Juror Hartman to be quiet so she could hear the witness's testimony."

The substance of that which is contained in the quoted language is made the basis of Ground No. 15 of the amended motion for a new trial.

Defendant contends that the Court cannot consider these affidavits or the testimony of jurors relating to the subject because of the rule in the state courts of Tennessee and the federal rule in the Sixth Circuit that the jurors will not be heard to impeach their verdict.

The rule that jurors cannot impeach their verdict is a well-recognized rule. It is not controlling of the situation in this case for the reason that the alleged misconduct of Juror Hartman involved extraneous matters. If the matter of inquiry involves extraneous matters considered by the jury in arriving at their verdict, then the Court may under

various circumstances receive affidavits and oral testimony pertaining to such matters.

Neither plaintiffs nor their counsel knew anything about these alleged statements of Juror Hartman to the jury, and could not have known about them because they were not at liberty to question the jury during the trial about those matters or any other matters. In view of this situation is the Court precluded from considering these grounds even though they were asserted in a motion more than ten days after judgment was entered in all of the cases except three?

Counsel for the Aluminum Company in their carefully prepared briefs do not say unequivocally that the court cannot as a matter of law or should not consider these grounds. The Court is of the opinion that these grounds were made the basis of the amended motion for a new trial within the time allowed by law.

If the Court is not permitted to consider these grounds under Rule 59 (b) of the Federal Rules of Civil Procedure, it is permitted to consider them under Rule 60 (b) of the Federal Rules of Civil Procedure because they involve newly discovered evidence.

This brings us to the question as to whether or not that which Mr. Hartman admittedly did was misconduct, and if so was it of such character to require the Court to grant a new trial?

Although the Court is of the opinion and holds that Mr. Hartman did not make these visits and inspections of the cattle in pursuance of an evil motive, it is firmly of the opinion that such inspections amounted to legal misconduct. In so holding the Court does not intend to and in fact does not reflect on the honesty and character of the Juror Hartman. That which he did was most unfortunate for all the parties to this litigation.

If the juror had not conveyed to his fellow jurors that which he learned from his own inspections, under some of the decisions discussed by counsel here today, there would be a serious question as to whether the Court should grant a new trial. But the juror, as indicated, conveyed that which he learned to his fellow jurors thus presenting to his fellow jurors evidence which they had not heard in open court and evidence about which the juror could not be examined or cross-examined.

The main question in the second phase of the litigation was whether or not the cattle of the plaintiffs had been damaged by the nuisance which the jury found and if so to what extent.

The juror during the trial visited the critical area and viewed the cattle, and on one occasion slowed down his car and then returned to the jury room and reported to his fellow jurors in substance that the cattle were about the best looking cattle that he had seen in a long time.

The Court is of the opinion and finds that the conduct of Juror Hartman prejudiced plaintiffs' claims in the minds of one or more of the jurors.

The first of these visits were not made before Sunday, June 22nd, 1958, and the information pertaining thereto was not conveyed to the other jurors before Monday, June 23rd, and neither the visits nor what was said about them could affect the verdicts rendered by the jury prior to June 23, 1958.

The Court is of the opinion and holds that Ground No. 14 of the motion for a new trial is well taken and is sustained insofar as it applies to the verdicts rendered on and subsequent to June 23, 1958.

A new trial is granted only on the question of damages with respect to the claims involved in the verdicts on and after June 23, 1958. In other words, a retrial of these

claims will follow the same course as the other claims followed in the trial involving the second phase of the lawsuit.

We now come to Grounds Nos. 1, 2, 3 and 4 of the original motions. These grounds relate to the action of the jury in failing to render adequate verdicts, in basing their verdicts on alleged passion, prejudice, untenable caprice, and failure to follow the instructions of the Court. The fourth and last ground asserts that in the cases where damages were denied altogether that such verdicts were without support by the evidence.

This Court cannot hold that any of the verdicts were based on passion, prejudice or caprice. Neither can the Court hold that the jury failed to apply the law as given by the Court in its charge except in the two cases hereinafter mentioned, nor can the Court hold that in the cases wherein the plaintiffs were denied damages that the verdicts were not supported by the evidence.

In that connection the issue of liability was sharply drawn in the first phase of the case. The jury found that the defendant created and maintained a temporary nuisance which was abated August 17, 1955. The Court is of the opinion and finds that there is substantial evidence to support that verdict of the jury. Apparently complaint is not made by either of the parties of this verdict.

In the second phase of the case each plaintiff claimed substantial damage. Defendant denied strenuously that each plaintiff was entitled to recover anything from it. Numerous witnesses were introduced by the respective parties purporting to support their respective theories. A number of these witnesses were veterinarians. Some of the testimony of the veterinarians was so conflicting that it was almost irreconcilable.

The jury saw and heard the witnesses. It is the prerogative of the jury to pass on the credibility of the witnesses.

The Court has no right to substitute its judgment for the judgment of the jury. The evidence presented issues of fact for the determination of the jury. In the opinion of the Court there is substantial evidence to support the verdict of the jury except as hereinafter found. See Wortham Bag Corp. v. Agnew, 6 Cir., 202 F. 2d 119.

The question in these four grounds for a new trial which has given the Court the most concern is the adequacy of the awards in some of the cases in which awards were made. Clearly in those cases in which awards were not made the question of whether there should or should not be an award was one for the jury and the jury's decision is supported by substantial evidence.

The Court is of the opinion and finds as a fact that there is substantial evidence to support the verdict of the jury in all of the actions except in the actions of J. P. Anderson et al. v. Aluminum Company of America, and T. H. Brown et al. v. Aluminum Company of America.

In the Anderson case the award was $1000.00. The proof showed that Anderson owned and operated a dairy. The verdict in that case, if there was any liability, about which the Court intimates no opinion, is inadequate in the light of the record as a whole and particularly some of the awards made in favor of other plaintiffs whose farms were in close proximity to the Anderson farm. In the opinion of the Court the verdict of the jury in this case was inconsistent on its face.

The award in favor of T. H. Brown was $600.00. What has been said in the Anderson case applies equally to the Brown case.

For these reasons the motions of Anderson and Brown for a new trial are granted.

Let an order be prepared and presented in accordance with the views herein expressed.

In the
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Tennessee,
Northern Division.

PAUL H. HITCH et al., Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, Defendant.

No. 2744.

JUDGMENTS ON MOTIONS FOR NEW TRIAL.

This case came on for hearing upon the pending original motions for a new trial and upon the pending amended or supplemental motion for a new trial, together with the affidavits of the jurors, Paul W. Moneymaker and Mrs. C. H. Thomas, which motions and affidavits were filed by the plaintiffs, Dr. J. C. Anderson, Dola N. Anderson, James P. Anderson and Martha B. Anderson; Horace R. Everett and Mae T. Everett; Marley Francis and Edith A. Francis; James B. Lovingood; T. H. Brown, Sr., Mrs. Lela Brown and T. H. Brown, Jr.; Earl L. Wilkinson and Catherine Wilkinson; Walter R. Pate, Irene Pate and Mack Pate; R. F. Bartholomew and Freeda Bartholomew; George Callahan and Evelyn M. Callahan; H. D. Loveday and Ida M. Loveday; L. H. Shields and Mary Shields; J. E. Coleman and Kate Coleman; P. A. Waters and Ada Waters; Raymond DeVault and Kirty Lee DeVault; Sam H. Loveday and Stella Loveday; Thomas Franklin Hitch; Hubert Young, Irene Young, Roxie Harrison, Jessie Carpenter, Ollie Young, Ruby Russell, Hayden Cawood, Vera Carpenter, Mary Catherine Porter, Fred Young, Roy Young

and Gary Paul Labor by Hubert Young, as next friend; Clyde Callahan and Beulah Callahan; John W. Hodge and Lillie Hodge; Roy O. Davis and Lena Davis; Creed Montgomery, Indietta Montgomery, Elbert Montgomery, Iris Montgomery, June Montgomery Harris and Mrs. Minnie Montgomery; J. F. Walters and Grace Walters; A. P. Crumley and June T. Crumley; O. M. Barbra and Lola Barbra; Paul Kidd and Georgie B. Kidd; Russell Myers and Mae Myers; Mrs. Ellen H. Wheeler and R. B. Wheeler; Ben C. Clark and Jim Hall; and K. L. Cruze and Elizabeth Cruze, whereupon the juror, E. E. Hartman, was called to the witness stand by said plaintiffs, at the suggestion of the Court, and testified with reference to certain conduct upon his part and certain statements made by him with reference thereto, and which are referred to in the supplemental motion for a new trial and the affidavits in support thereof, and the jurors, R. S. Reynolds and Paul W. Moneymaker, having also been called to the witness stand and testified with reference to the time of the making of such statements by the juror Hagtman.

And the Court having heard such testimony and the argument of counsel on said motions and having fully considered the briefs on said motions as filed by the respective parties doth overrule all of the grounds set forth in the amended motion, with the exception of the fourteenth ground thereof. As to the fourteenth ground, set forth in said amendatory or supplemental motion, the Court doth find, order and adjudge that said ground was timely filed and served and is well made, and that said juror Hartman, by reason of his viewing of certain cattle in Blount County, Tennessee, during the time that he was sitting on said jury as a trial juror and reporting to the other jurors with reference to his viewing of said cattle, was guilty of such misconduct that those plaintiffs whose cases were deliberated upon and in which verdicts were rendered subsequent

to the time of his making of the statements to the jury are entitled to a new trial. The Court further finds from the testimony of the jurors that this occurrence took place on or after June 23, 1958.

It Is Accordingly Ordered, Adjudged and Decreed by the Court that as to all those plaintiffs who presently have motions for a new trial pending before the Court and whose cases were considered and verdicts rendered by the jury before June 23, 1958, the amendatory or supplemental motion for new trial is overruled in its entirety, but it is ordered that the plaintiffs Sam H. Loveday and Stella Loveday; Thomas Franklin Hitch; Hubert Young, Irene Young, Roxie Harrison, Jessie Carpenter, Ollie Young, Ruby Russell, Hayden Cawood, Vera Carpenter, Mary Catherine Porter, Fred Young, Roy Young and Gary Paul Labor, by Hubert Young as next friend; Clyde Callahan and Beulah Callahan; John W. Hodge and Lillie Hodge; Roy O. Davis and Lena Davis; Creed Montgomery, Indietta Montgomery, Elbert Montgomery, Iris Montgomery, June Montgomery Harris and Mrs. Minnie Montgomery; J. E. Walters and Grace Walters; A. T. Crumley and June T. Crumley; O. M. Barbra and Lola Barbra; Paul Kidd and George B. Kidd; Russell Myers and Mae Myers; Mrs. Ellen H. Wheeler and R. B. Wheeler; Ben C. Clark and Jim Hall; and K. L. Cruze and Elizabeth Cruze, each of whose claims or actions on what is known and designated as Phase II of this case, was considered by the jury subsequent to June 23, 1958, be, and they hereby are, granted a new trial on said Phase II of these actions, namely, for the determination by a jury of whether these named plaintiffs, or any of them, at any time during the period in which the jury found in Phase I of this case that the defendant maintained a temporary nuisance in so far as said period is applicable to them, respectively, in view of any previous settlements and/or the statute of limitations, suf-

fered any damage from the maintaining of such temporary nuisance by the defendant, and if so, the respective amount or amounts thereof.

The Court doth further overrule all grounds set forth in the original motions for new trial filed by each and all of said plaintiffs, except as to the plaintiffs, Dr. J. C. Anderson, Dola N. Anderson, James P. Anderson and Martha B. Anderson and T. H. Brown, Sr., Lela Brown and T. H. Brown, Jr. As to these two sets of plaintiffs the Court is of the opinion, and doth hold, that they should be granted a new trial for the reason that, in the opinion of the Court, if they are respectively entitled to any award the awards as made to them by the jury are inadequate.

Therefore the plaintiffs, Dr. J. C. Anderson, Dola N. Anderson, James P. Anderson and Martha B. Anderson, and the plaintiffs, T. H. Brown, Sr., Lela Brown and T. H. Brown, Jr., are granted a new trial in what is known and designated as Phase II of these actions, namely, for the determination by a jury of whether these named plaintiffs, or any of them, during the period between January 1, 1953, and August 17, 1955, during which period the jury in Phase I found that the defendant maintained a temporary nuisance, suffered any damage from the maintaining of such temporary nuisance by the defendant and, if so, the respective amount or amounts thereof. All other grounds asserted by the said Anderson and Brown plaintiffs in their said original motions for new trial are overruled.

In so far as concerns the plaintiffs whose motions for new trial have been entirely overruled, in view of the Order heretofore entered with reference to taxation of costs, no portion of the costs of the case will be adjudicated against them. In so far as concerns the plaintiffs who are granted a new trial by this Order the adjudication of any

costs not hereinbefore awarded shall await the further action of the Court.

Enter

ROBT. L. TAYLOR,
Judge.

O. K. as to Form:

J. H. DOUGHTY,
RICHARD L. CARSON,
FRED HENRY,
Attorneys for Plaintiffs.

R. ARNOLD KRAMER,
R. R. KRAMER,
Attorneys for Defendant.

JUDGMENT.

(Filed December 31, 1959.)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal is dismissed, the petition for writ of certiorari is denied, and the judgment of the District Court granting the motions for new trial is affirmed.

No. 13,782.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

ALUMINUM COMPANY OF AMERICA, Appellant, v. SAM H. LOVEDAY, Et Al., Appellees.	Appeal from the United States District Court for the Eastern District of Tennessee.

Decided December 31, 1959.

Before: McAllister, Chief Judge; Martin and Weick, Circuit Judges.

Per Curiam. In this protracted litigation in the Eastern District of Tennessee, the trial judge granted the motions for new trial of certain plaintiffs whose cattle had been injured and whose property had been damaged from injurious gases sent forth from the plant of appellant, Aluminum Company of America. The correctness of the action of the trial judge is challenged by direct appeal and, in the alternative, by petition for writ of certiorari.

The principal reason for granting a new trial by the district court was based on affidavits and testimony of jurors regarding remarks of one of the jurors concerning his personal observation of cattle: that, during the trial, he had visited the critical area, viewed the cattle, and had returned to the jury room and reported to his fellow jurors, in substance, that the cattle were about the best looking he had seen in a long time. The United States

District Judge expressed the opinion and made a finding that the conduct of the juror had prejudiced the claims of the plaintiffs in the minds of some of the jurors.

The appellees contend that the order from which the appeal was taken is not a final order and, therefore, is not appealable; that this court has no jurisdiction to hear the appeal, nor to grant the writ of certiorari for which the appellant prays; and that the district court had full authority and jurisdiction to act upon and grant the motions for new trial. **Roche v. Evaporated Milk Association**, 319 U. S. 21; **City of Louisa v. Levi**, 140 F. (2d) 512, 513 (C. A. 6); **Turnbull v. United States**, 139 F. (2d) 126 (C. A. 6); **Borg-Warner Corporation v. Whitney**, 121 F. (2d) 444 (C. A. 6); **Gillespie v. Schram**, 108 F. (2d) 39 (C. A. 6); **Grand Trunk Western R. Co. v. McHie**, 100 F. (2d) 86 (C. A. 6).

It is well settled that an appeal does not lie from an order granting a new trial. **Ford Motor Company v. Busam Motor Sales, Inc.**, 185 F. (2d) 531, 533 (C. A. 6), citing authorities; **Frank Mercantile Corporation v. Prudential Insurance Company of America**, 115 F. (2d) 496 (C. A. 3). Chief Justice Taft, when a member of this court in 1897, stated that a motion for a new trial is addressed to the discretion of the court and is not the subject of review, when in the exercise of his discretion the trial court either grants or denies the motion. **Felton v. Spiro**, 78 Fed. 576 (C. A. 6).

We are aware of the splendid contribution made to due process of law by Mr. Justice Lamar in **McDonald v. Pless**, 238 U. S. 264, in which he wrote most eloquently to the effect that a juror may not be permitted to impeach his own verdict by revealing proceedings in the jury room. In our opinion, however, this authority is not applicable here for the reason that, disregarding what the recreant juror may have told his fellow jurors about the fine appearance

of the cattle, he, as one of the jury panel, by his extraneous action in viewing the cattle and determining that they looked fine, disqualified himself to sit as a juror. When he sat, he polluted the jury's verdict.

The same result is reached, whether or not our review is bottomed upon the motion of the appellee to dismiss the appeal, or to deny the petition of appellant for writ of certiorari. The action taken by the district court was in the exercise of his jurisdiction and was not such abuse of his judicial discretion as to constitute reversible error.

Accordingly, the appeal is dismissed, the petition for writ of certiorari is denied, and the judgment of the district court granting the motions for new trial is affirmed.